No. 10357

# United States
# Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MARY T. MARIN,

Appellee.

# Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
MAR 19 1943
PAUL P. O'BRIEN,
CLERK

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO 60-3-10-43

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


Page

Amendment to Complaint, filed Nov. 18, 1942.. 28

Answer of Mary T. Marin..... 21

Appeal:

Certificate of Clerk to Transcript of Record on ..... 42

Designation of Record on (DC) ..... 37

Notice of ..... 37

Order Extending time to Docket..... 41

Order Staying Proceedings Pending (CCA) ..... 38, 44

Statement of Points on (CCA) ..... 46

Certificate of Clerk to Transcript of Record on Appeal ..... 42

Complaint ..... 2

Exhibit A—Land taken and condemned... 10

Complaint, Amendment to ..... 28

Declaration of Taking ..... 11

Exhibit A—Photostatic copy of sketch showing land selected for acquisition.... 15

Designation of Record on Appeal (DC) ..... 37

Judgment, filed February 9, 1942 ..... 17

Judgment of Dismissal ..... 34

Motion to Dismiss of Mary T. Marin..... 30

Minute Orders:

Nov. 13, 1942 re Motion to Amend Complaint etc. ..... 25

Nov. 18, 1942 re Motion to Amend Complaint etc. ..... 27

Nov. 24, 1942 re Motion to Dismiss ..... 32

Nov. 27, 1942 re Judgment ..... 33

Names and Addresses of Attorneys ..... 1

Notice of Appeal ..... 37

Order Extending Time to Docket Appeal..... 41

Order Staying Proceeding Pending Appeal (CCA) ..... 38, 44

Affidavit of M. Mitchell Bourquin..... 39, 45

Statement of Points, Appellant's (CCA)..... 46

NAMES AND ADDRESSES OF ATTORNEYS

M. MITCHELL BOURQUIN, ESQ.,
Special Assistant to The Attorney General
710 Crocker Building
San Francisco, California
Attorney for Plaintiff and Appellant,

CHARLES O. BRUCE, ESQ.,
FRANCIS T. CORNISH, ESQ.,
1206 American Trust Building
Berkeley, California
Attorneys for Defendant and Appellee.

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 22080-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1.9 acres of land, more or less, in Berkeley, Alameda County, California, SECURITY INVESTMENT COMPANY, a corporation, SEASIDE OIL COMPANY, a corporation, MARY T. MARIN, CITY OF BERKELEY, COUNTY OF ALAMEDA, STATE OF CALIFORNIA, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, FIRST DOE CORPORATION, SECOND DOE CORPORATION, THIRD DOE CORPORATION, FOURTH DOE CORPORATION AND FIFTH DOE CORPORATION,

Defendants.

## COMPLAINT

Now comes the United States of America by M. Mitchell Bourquin, Special Assistant to the Attorney General, at the direction and under the authority of the Attorney General of the United States and pursuant to the request of the Acting Secretary of the Navy, and for cause of action

against the above named defendants, alleges as follows: [1*]

I.

That this proceeding is instituted and the lands hereinafter described are taken pursuant to and under the authority of the provisions of the Acts of Congress approved July 29, 1941 (Public Law 192, 77th Congress; 55 Stat., Chap. 328); August 25, 1941 (Public Law 247, 77th Congress; 55 Stat., Chap. 400); August 1, 1888 (25 Stat., 357; U.S.C. Title 40, Sec. 257), and February 26, 1931 (46 Stat., 1421; U.S.C. title 40, sec. 258a), and any acts amendatory thereof or supplementary thereto.

II.

That the land hereinafter described is taken and condemned under the authority of the above-mentioned acts of Congress; for the uses and purposes authorized by said acts and is sought and taken by plaintiff for the establishment of essential equipment and facilities for the expansion of the American Forge Company, Berkeley, California, for use in the production of steel forgings for naval purposes; that said use of said land constitutes a public use and said lands have been selected by the Acting Secretary of the Navy for acquisition for said purposes and uses above stated and is required for immediate use in order that the necessary work may be begun thereon for carrying out said purposes and uses.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

III.

That the acquisition of said land by plaintiff will be of the greatest public benefit and the least private injury; that no part of said land has heretofore been appropriated for public use by said plaintiff, the State of California, or any political subdivision thereof. [2]

IV.

That the estate or interest which plaintiff seeks to take and condemn in the land hereinafter described is the fee simple title in and to said land, subject to existing public utility easements, if any.

V.

That there are sufficient funds now available with which plaintiff can and is authorized to pay just compensation for the land sought to be taken and condemned herein in whatever sum may be ultimately awarded in this proceeding for the taking of said land and any damages resulting therefrom.

VI.

That the land to be taken and condemned in this proceeding aggregates 1.9 acres, more or less, is situate in Berkeley, Alameda County, California, and is more particularly described as follows:

> Beginning at the corner formed by the intersection of the south line of Potter Street and the west line of Overland Avenue or Front Street; thence running south along the west side of Overland Avenue or Front Street to the

intersection of the north line of the State Highway; thence east along the State Highway and the south line of Lot 61 to the southeast corner of Lot 61; thence in a northeasterly direction along the north line of State Highway to the intersection of the south line of Murray Street; thence west along the south line of Murray Street to the northeast corner of Lot 57; thence north across Murray Street to the southeast corner of Lot 76; thence west along the south line of Lot 76 to the southwest corner of said Lot; thence north along the east line of Lots 75 and 167 to the northeast corner of Lot 167 and the south line of Potter Street; thence west along the south line of Potter Street to the point of beginning, containing 1.9 acres, more or less.

VII.

That a plan showing the land taken as above described is attached hereto, marked Exhibit "A" and made a part hereof by reference. [3]

VIII.

That plaintiff is informed and believes and therefore alleges that none of said land taken by this proceeding is a part of any larger tract belonging to the apparent or purported owners of said land herein described.

IX.

That the apparent and purported owners of the above described land and the sums deposited in the

Registry of the Court as estimated just compensation for the taking thereof are as follows:

| Name | Lot No. | Estimated Fair Compensation |
|---|---|---|
| Mary T. Marin | 75 | $1,200.00 |
| Security Investment Co. | 65 to 74 inclusive | 20,800.00 |
| Seaside Oil Company | 167 to 169 inclusive | 20,800.00 |
| Security Investment Co. | 61 to 64 incl. part of 57 to 60 inclusive | 4,650.00 |
| City of Berkeley | For any streets, roads alleys or any interest or easement in any and all of the lands herein taken or appurtenances thereunto belonging. | 1.00 |

X.

That all of the persons, firms or corporations who have or who may claim any interest in and to the above described property and who are therefore joined as defendants are the following: City of Berkeley, County of Alameda and State of California.

XI.

That the defendants First Doe to Fifth Doe, inclusive, [4] and First Doe Corporation to Fifth Doe Corporation, inclusive, are sued and designated herein by fictitious names for the reason that their true names are unknown to plaintiff but the plaintiff will, upon ascertaining their true names, substitute the same for such fictitious names by appropriate amendment ,and prays such leave of the Court; that said defendants, and each of them, may have or claim to have an interest in some piece or

parcel of the land sought to be taken and condemned in this action, but that the nature, character, or extent of such interest is unknown to plaintiff.

XII.

That simultaneously with the filing of this complaint, the Acting Secretary of the Navy is causing to be filed in this Court and cause, and filing on behalf of plaintiff, a Declaration of Taking, pursuant to the provisions of the Act of February 26, 1931 (46 Stat., 1421; U.S.C. title 40, sec. 258a) wherein and whereby said land heretofore described is taken in fee simple subject to existing public utility easements, if any, for the use and benefit of the United States of America, as aforesaid; and that with the filing of said Declaration of Taking, the plaintiff is paying into the Registry of this Court, to the use of the persons entitled thereto, as the estimated just compensation for the taking of said land heretofore described, the sum of Twenty-Six Thousand Six Hundred Fifty-One and no/100 Dollars ($26,651.00).

Wherefore, plaintiff prays judgment: [5]

1. Decreeing that on the filing of the Declaration of Taking and the depositing of the estimated just compensation for the lands subject of this action, the quantum of title and estate which plaintiff seeks to acquire in this action in the above described lands vested in the United States of America and the right to just compensation vested in the persons entitled thereto.

2. Fixing the time within which and the terms upon which the possession of said land shall be delivered to the plaintiff.

3. Decreeing that said land is taken for and applied to necessary public uses of the plaintiff as authorized by law and that all of said land is necessary thereto.

4. Determining the value of the land subject of this action and each separate interest therein and directing the payment for each separate interest to the persons entitled thereto.

5. For such other and further relief as the Court may deem meet and proper in the premises.

M. MITCHELL BOURQUIN
Special Assistant to the Attorney General
Attorney for Plaintiff [6]

## VERIFICATION

United States of America
Northern District of California
City and County of San Francisco—ss.

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States, and attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein

stated on his information or belief, and as to those matters that he believes it to be true.

That the reason why this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign.

That the sources of affiant's information and the grounds for his belief are the official communications, records, files, and documents received from the Attorney General of the United States, and from the Navy Department of the United States.

M. MITCHELL BOURQUIN

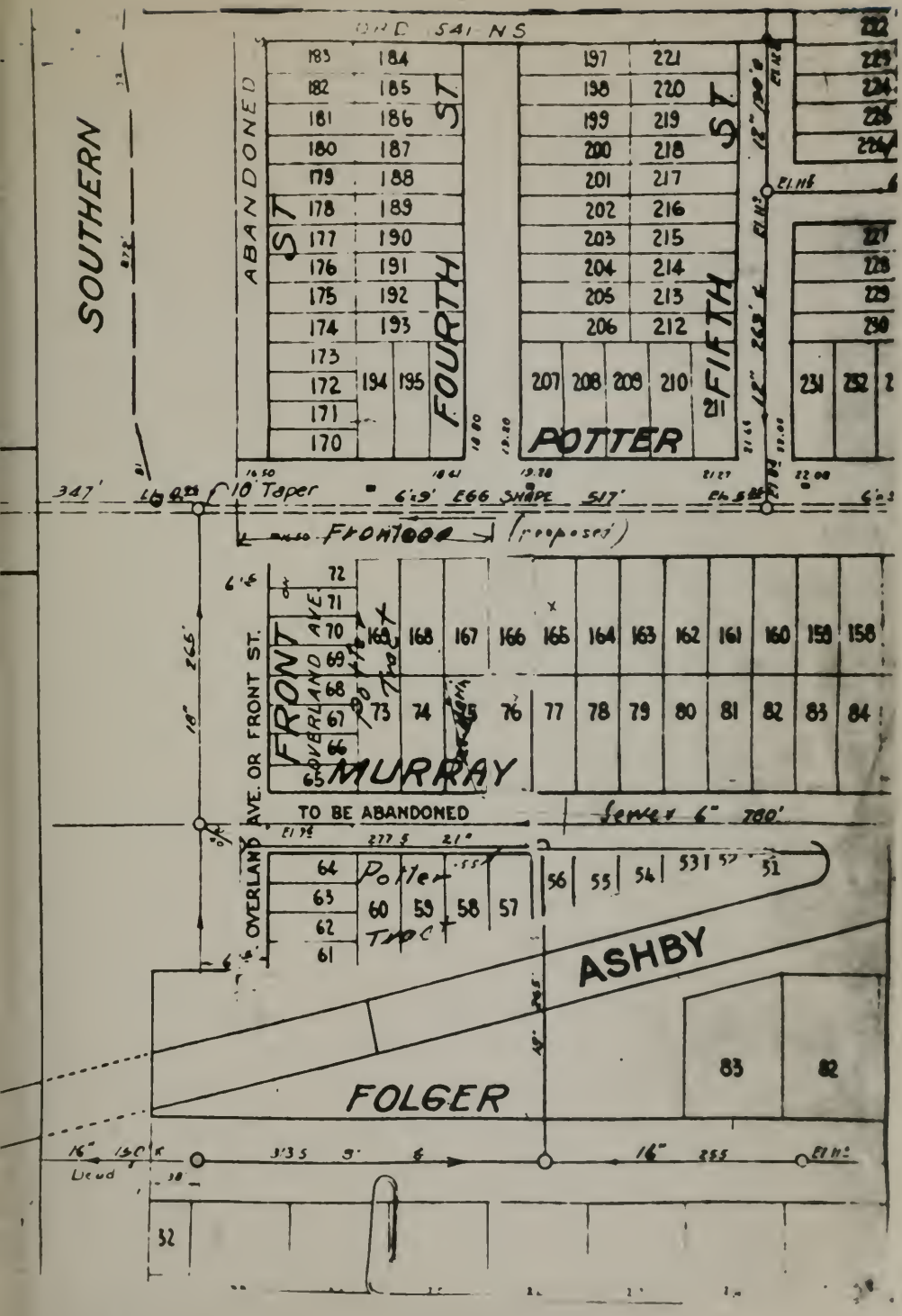
Subscribed and sworn to before me this 9th day of February, 1942.

[Seal] LOUIS V. VASQUEZ

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Dec. 4, 1943.

[Endorsed]: Filed Feb. 9, 1942, at 4:05 P.M. [7]




 Filed Feb. 9, 1942 at 4:05 PM

[Title of District Court and Cause.]

DECLARATION OF TAKING

Whereas, it has become necessary that the lands which are the subject of condemnation in the above entitled proceeding be taken for immediate public use by the United States of America for the establishment of essential equipment and facilities for the expansion of the American Forge Company, Berkeley, California, for use in the production of steel forgings, upon the filing of this declaration of Taking,

Now, Therefore, I, James Forrestal, Acting Secretary of the Navy, acting for and in the capacity of the Secretary of the Navy, under and pursuant to the provisions of the Acts of Congress approved July 29, 1941 (Public Law 192, 77th Congress; 55 Stat., Chap. 328); August 25, 1941 (Public Law 247, 77th Congress; 55 Stat., Chap 409); August 1, 1888 (25 Stat., 357; U.S.C., title 40, sec. 257), and February 26, 1931 (46 [8] Stat., 1421; U. S. C., title 40, sec. 258a), do hereby make and cause to be filed this declaration of taking, pursuant to said Acts of Congress and any acts amendatory thereof or supplementary thereto, and by virtue and authority thereof, do hereby state that I have selected for acquisition 1.9 acres of land, more or less, in Berkeley, Alameda County, California, which said lands are shown on a photostatic copy of a sketch which is attached hereto as Exhibit "A" and made a part of this declaration of taking. Said lands are more particularly described as follows:

Beginning at the corner formed by the intersection of the south line of Potter Street and the west line of Overland Avenue or Front Street; thence running south along the west side of Overland Avenue or Front Street to the intersection of the north line of the State Highway; thence west along the State Highway and the south line of Lot 61 to the southeast corner of Lot 61; thence in a northeasterly direction along the north line of State Highway to the intersection of the south line of Murray Street; thence west along the south line of Murray Street to the northeast corner of Lot 57; thence north across Murray Street to the southeast corner of Lot 76; thence west along the south line of Lot 76 to the southwest corner of said Lot; thence north along the east line of Lots 75 and 167 to the northeast corner of Lot 167 and the south line of Potter Street; thence west along the south line of Potter Street to the point of beginning, containing 1.9 acres, more or less.

And I do declare said lands to be taken under authority of the aforesaid acts of Congress; that the use to which said lands are to be put is the same as authorized by said acts; and that the estate hereby taken in said lands for the public use aforesaid is in fee simple, subject to existing public utility easements, if any.

And I, James Forrestal, Acting Secretary of the

Navy, acting for and in behalf of the Secretary of the Navy, do hereby state that the sum of money estimated by me to be just compensation for all of said lands, improvements thereon and appurtenances thereunto belonging, is twenty-six thousand [9] six hundred and fifty-one dollars ($26,651.00), which said sum having been appropriated by Congress is hereby deposited into the registry of the court for the use and benefit of the persons entitled thereto, and that the names and addresses of the owners of said property or interests therein and the amount of just compensation for said lands, and improvements thereon, which are hereby taken are shown on Schedule "A" which is hereto attached and made a part of this declaration of taking. I am of the opinion that the ultimate award for the taking of said lands will be within the limits prescribed by Congress.

In Witness Whereof, the petitioner, by and through the said James Forrestal, Acting Secretary of the Navy, acting for and in behalf of the Secretary of the Navy, has caused this declaration of taking to be signed in its name and has caused the seal of the Navy Department to be affixed hereto on the 31st day of January, 1942, in the City of Washington, District of Columbia.

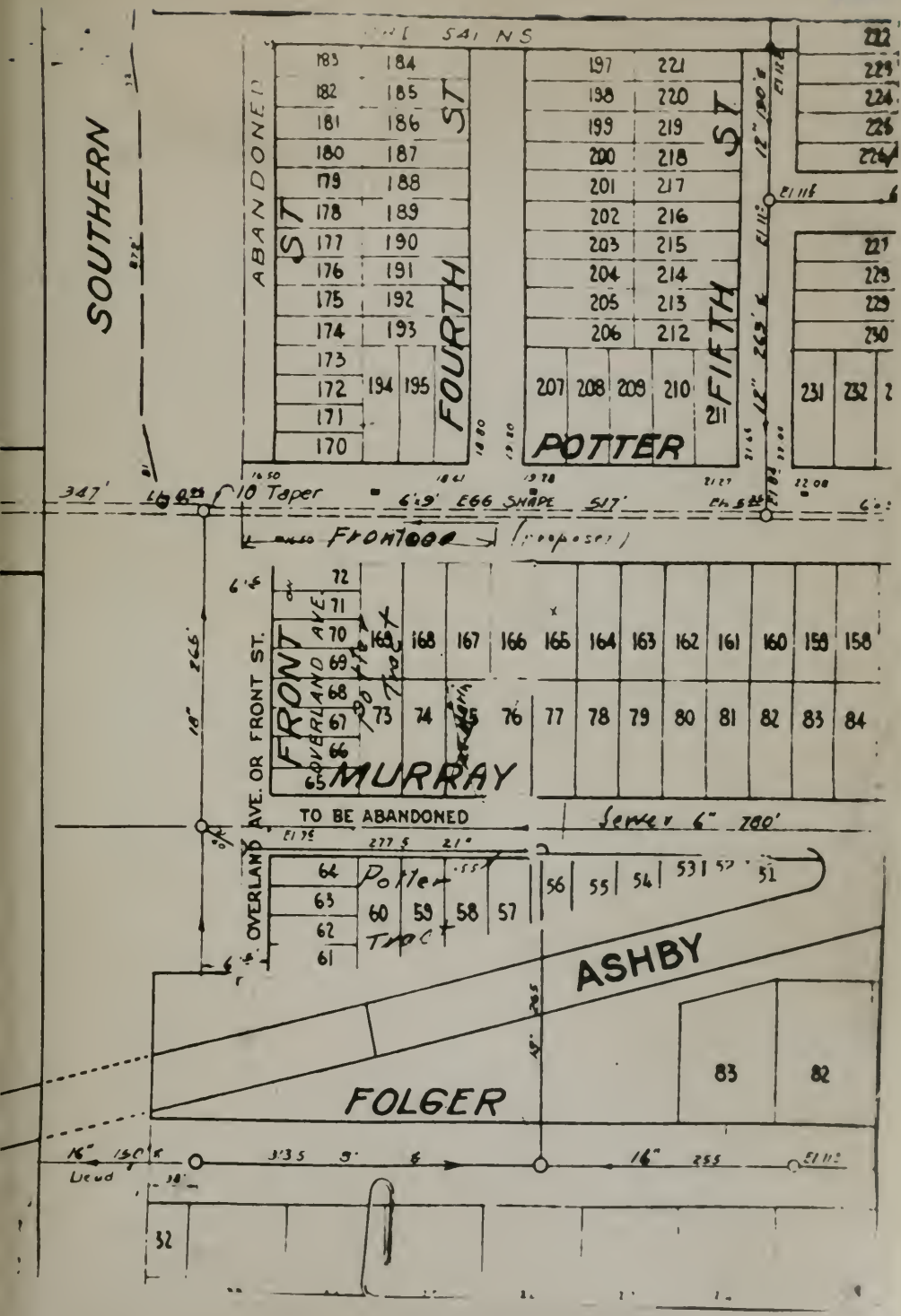
UNITED STATES OF
[Seal] AMERICA
By JAMES FORRESTAL
Acting Secretary of the
Navy [10]

Schedule "A"

The names and addresses of the persons having title to or other interest in the lands described in the within declaration of taking, and the amounts estimated to be fair compensation for each respective ownership, including all improvements thereon, are as follows:

| Name and Address | Lot No. | Estimated Fair Compensation |
|---|---|---|
| Mary T. Marin<br>Berkeley, California | 75 | $1,200.00 |
| Security Investment Co.,<br>Berkeley, California. | 65 to 74<br>inclusive | 20,800.00 |
| Seaside Oil Company,<br>Berkeley, California.<br>lessee | 167 to 169<br>inclusive | |
| Security Investment Co.,<br>Berkeley, California | 61 to 64 inclusive<br>part of 57 to 60 inclusive | 4,650.00 |
| City of Berkeley,<br>County of Alameda,<br>State of California | For any streets, roads, alleys or any interest or easement in any and all of the lands herein taken or appurtenances thereunto belonging. | 1.00 |
| | Total | $26,651.00 |

[11]




Filed Feb. 9, 1942

[Title of District Court and Cause.]

JUDGMENT

The United States of America having this day made application to the Court to enter a Judgment on the Declaration of Taking heretofore filed this day, and for an Order fixing the date when possession of the property herein described is to be surrendered to the United States of America, and upon consideration thereof and of the Condemnation Complaint filed herein, said Declaration of Taking, [12] the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed for in said complaint;

Second: That a Complaint in Condemnation was filed at the request of the Acting Secretary of the Navy, the authority empowered by law to acquire the lands described in said Complaint, and also under authority of the Attorney General of the United States;

Third: That said Complaint and Declaration of Taking state the authority under which, and the public use for which said lands were taken, that the Acting Secretary of the Navy is the person duly authorized and empowered by law to acquire lands such as are described in the Complaint for use by the United States of America for the establish-

ment of essential equipment and facilities for the expansion of the American Forge Company, Berkeley, California, for use in the production of steel forgings, and for such other uses as may be authorized by Congress or by executive order, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Fourth: That a proper description of the lands sought to be taken, sufficient for identification thereof, is set out in said Declaration of Taking;

Fifth: That said Declaration of Taking contains a statement of the estate or interest in the said lands taken for such public use;

Sixth: That a plan showing the lands taken is incorporated in said Declaration of Taking; [13]

Seventh: That a statement is contained in said Declaration of Taking of a sum of money estimated by said Acting Secretary of the Navy to be just compensation for said land in the amount of Twenty-six thousand six hundred fifty-one and no/100 Dollars ($26,651.00), and that said sum was deposited in the Registry of this Court for the use of the persons entitled thereto, upon and at the time of the filing of said Declaration of Taking;

Eighth: That a statement is contained in said Declaration of Taking that the amount of the ultimate award of compensation for the taking of said property, in the opinion of said Acting Secretary of the Navy of the United States of America, will be within any limits prescribed by Congress as to the price to be paid therefor.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the title to that certain tract of land aggregating 1.9 acres, more or less, situate and being in Berkeley, Alameda County, California, and more particularly described as follows:

> Beginning at the corner formed by the intersection of the south line of Potter Street and the west line of Overland Avenue or Front Street; thence running south along the west side of Overland Avenue or Front Street to the intersection of the north line of the State Highway; thence east along the State Highway and the south line of Lot 61 to the Southeast corner of Lot 61; thence in a northeasterly direction along the north line of State Highway to the intersection of the south line of Murray Street; thence west along the south line of Murray Street to the northeast corner of Lot 57; thence north across Murray Street to the southeast corner of Lot 76; thence west along the south line of Lot 76 to the southwest corner of said Lot; thence north along the east line of Lots 75 and 167 to the northeast corner of Lot 167 and the south line of Potter Street; thence west along the south line of Potter Street to the point of beginning, containing 1.9 acres, more or less. [14]

in fee simple absolute, subject to existing public utility easements, if any, vested in the United States of America, and the right to just compensation therefor vested in the persons entitled thereto upon

the filing of said Declaration of Taking and the depositing in the Registry of this Court the sum of Twenty-six thousand six hundred fifty-one and no/100 dollars ($26,651.00) as hereinabove recited; that said lands are deemed to have been taken and condemned for the public use of the plaintiff as authorized by law and are necessary and suited to said use; that just compensation for the taking of said lands shall be ascertained and awarded by judgment herein, and

It Is Further Ordered, Adjudged and Decreed that the plaintiff, United States of America, and its duly authorized agents and officers are entitled to and shall be let into immediate possession of said tract of land hereby acquired, taken and condemned for its use and the possession thereof shall be delivered immediately to the United States of America and its agents and the defendants, or any person or persons claiming to have any interest in said above described lands, or any part thereof, or any person or persons in possession of said lands and appurtenances, or any part thereof, are all and singularly hereby ordered forthwith to surrender said lands to the United States of America, and

It Is Further Ordered, Adjudged and Decreed that the sum of twenty-six thousand six hundred fifty-one and no/100 dollars ($26,651.00), deposited in the Registry of this Court for its distribution, and that said cause be held open for such other and further orders, judgments [15] and decrees of

this Court as may be just and equitable in the premises.

Done in open Court this 9th day of February, 1942.

A. F. ST. SURE,

Judge, United States District Court, Northern District of California.

[Endorsed]: Filed Feb. 9, 1942, at 4:17 P. M. [16]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT, MARY T. MARIN

The defendant, Mary T. Marin, for her separate answer to the Complaint on file herein, admits, denies and alleges as follows: [17]

I.

Answering Paragraph I of said Complaint, this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, basing her answer upon that ground, denies each and every, all and singular, generally and specifically, the allegations contained therein;

II.

Answering Paragraph II of said Complaint, this defendant denies that the alleged use of said land constitutes a public use; alleges that said use is for private gain; and alleges that she is without knowledge or information sufficient to form a belief as

to the truth of the allegations that said land is taken or condemned under the authority of the mentioned Acts of Congress, or for the uses or purposes authorized by said Acts, or that said land has been selected by the Acting Secretary of the Navy, or by anyone, for acquisition for the purposes or uses stated or otherwise, and, basing her denial upon that ground, denies generally and specifically said allegations and each and every part thereof;

III.

Answering Paragraph III of said Complaint, this defendant denies that the acquisition of said land by plaintiff, as asserted, will be of the greatest or any public benefit or the least private injury;

IV.

Answering Paragraph IV and V of said Complaint, this defendant alleges that she is without knowledge or [18] information sufficient to form a belief as to the truth of the allegations contained in said paragraphs and each of them, and, basing her answer upon that ground, denies each and every, all and singular, generally and specifically, the allegations contained in said paragraphs and each of them;

V.

Answering Paragraph IX of said Complaint, this defendant alleges that she is the sole owner of all that certain land situate in the City of Berkeley, County of Alameda, State of California, described as follows:

Beginning at a point on the northern line of Murray Street distant thereon easterly one hundred and sixty (160) feet from the intersection thereof with the eastern line of Front Street, as said streets are shown on the map hereinafter referred to; running thence easterly along said line of Murray Street forty (40) feet; thence northerly parallel with said line of Front Street one hundred (100) feet; thence westerly parallel with said line of Murray Street forty (40) feet; thence southeasterly parallel with said line of Front Street one hundred (100) feet to the point of beginning;

Being Lot No. 75, as said lot is delineated and designated upon that certain map, entitled "Map of the Potter Tract, Berkeley, Alameda Co., Cal., 1892" filed June 3rd, 1892, in Liber 17 of Maps, page 19, in the office of the county recorder of said Alameda County;

That the reasonable value of said land at the date of the filing of the Complaint herein was and now is Six Thousand Dollars ($6000.00); denies that the sum of Twelve Hundred Dollars ($1200.00), or any other sum less than Six Thousand Dollars ($6000.00), is fair, or reasonable or just compensation for the taking of said land, and, as to the other allegations contained in said paragraph, this defendant is without knowledge or information sufficient to form a belief as to the truth thereof and, therefore, leaves plaintiff to its proofs; [19]

VI.

Answering Paragraph X of said Complaint, this defendant alleges that she is the sole owner of the land described in Paragraph V of this Answer and referred to as Lot 75 in Paragraph IX of said Complaint;

VII.

Answering Paragraph XII of said Complaint, this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, basing her answer upon that ground, denies each and every, all and singular, generally and specifically, the allegations contained therein;

Wherefore, defendant, Mary T. Marin, prays judgment:

(a) That plaintiff be denied any right to take any part or portion of the land of this defendant, described in said Complaint or in this Answer, or, in the alternative, if it be found that plaintiff is entitled to take said land:

(b) That this defendant have and recover from plaintiff, damages in the sum of Six Thousand Dollars ($6000.00) for the taking of said land;

(c) That this defendant have and recover her costs of suit incurred herein;

(d) That this defendant be granted such other and further relief as the Court may deem meet and proper in the premises.

CHAS. O. BRUCE,
Attorney for Defendant,
MARY T. MARIN. [20]

State of California,
County of Alameda—ss.

Mary T. Marin, being first duly sworn, deposes and says:

That she is one of the defendants above named; that she has read the foregoing Answer and knows the contents thereof; that the facts therein stated are true of her own knowledge, except as to the facts therein stated on information or belief, and as to those facts she believes it to be true.

MARY T. MARIN.

Subscribed and sworn to before me this 14th day of March, 1942.

[Seal] CHAS. O. BRUCE,
Notary Public in and for the County of Alameda, State of California.

(Receipt of Service.)

[Endorsed]: Filed Mar. 16, 1942. [21]

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District Court of the United States
Northern District of California
Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 13th day of November, in the year of our Lord one thousand nine hundred and forty-two.

Present: the Honorable John C. Bowen, D. J. for the Western District of Washington, designated to hold and holding this Court.

No. 22080-W. Civil

[Title of Cause.]

This case came on this day for trial before the Court sitting without a jury. M. Mitchell Bourquin, Esq., and Robert F. Reynolds, Esq. appeared as attorneys for plaintiff, and Charles O. Bruce, Esq. appeared as attorney for the defendant Mary T. Marin. On motion of Mr. Bruce, it is Ordered that Francis T. Cornish, Esq. be and he is hereby associated as attorney for the defendant Mary T. Marin. Mr. Cornish, on behalf of the defendant Mary T. Marin, made a motion to dismiss this action on the grounds stated. Thereupon Mr. Bourquin made a motion to amend the complaint on the face thereof by adding to line 18, paragraph 11, on page 2, after the word "forgings" the words "for naval purposes," which said motion was ordered granted. After further hearing the attorneys, it is Ordered that the motion to dismiss this action be and the same is hereby granted with leave to plaintiff to amend within five (5) days from the date hereof, and plaintiff allowed an exception to the ruling of the Court. Ordered that this case be stricken from the trial calendar. [38]

District Court of the United States
Northern District of California
Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 18th day of November, in the year of our Lord one thousand nine hundred and forty-two.

Present: the Honorable John C. Bowen, D. J. for the Western District of Washington, designated to hold and holding this Court.

No. 22080-W. Civil

[Title of Cause.]

After hearing M. Mitchell Bourquin, Esq., attorney for plaintiff, and Charles O. Bruce, Esq. and Francis T. Cornish, Esq. attorneys for the defendant Mary T. Marin, it is Ordered that the plaintiff be and it is hereby granted leave to amend the complaint on the face thereof by inserting after the word "taken" on line 15, page 2, the words "by plaintiff." Further Ordered that plaintiff be allowed to file an amendment to the complaint herein. Mr. Cornish orally made a motion to dismiss the complaint as amended. After hearing the attorneys, it is Ordered that the further hearing on the motion to dismiss the complaint as amended be continued to November 21, 1942, at 10:30 o'clock A. M. [39]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Now comes the United States of America, by M. Mitchell Bourquin, Special Assistant to the Attorney General, at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the Acting Secretary of the Navy, and with leave of Court first had and obtained, files this Amendment to Complaint, to read as follows: [40]

I.

Amends Paragraph I to read as follows: That this proceeding is instituted and the lands hereinafter described are taken pursuant to and under the authority of the provisions of the Acts of Congress approved July 29, 1941 (Public Law 192, 77th Congress; 55 Stat., Chap. 328); August 25, 1941 (Public Law 247, 77th Congress; 55 Stat., Chap. 409); August 1, 1888 (25 Stat. 357; U.S.C. Title 40, Sec. 257); February 26, 1931 (46 Stat., 1421; U.S.C. Title 40, Sec. 258a); December 23, 1941 (Public Law 371, 77th Congress; 54 Stat. 676); and March 27, 1942 (Public Law 507, 77th Congress, Second War Powers Act) and any Acts amendatory thereof or supplementary thereto.

II.

Amends Paragraph II to read as follows: That the land hereinafter described is taken and condemned under the authority of the above-mentioned Acts of Congress for the uses and purposes author-

ized by said Acts, and is sought and taken by the plaintiff for the establishment of essential equipment and facilities for the expansion of the American Forge Company, Berkeley, California, for use in the production of steel forgings for naval purposes; that said use of said land constitutes a public use and said lands have been selected by the Acting Secretary of the Navy for acquisition for said purposes and uses above stated and is required for immediate use in order that the necessary work may be begun thereon for carrying out said purposes and uses.

Wherefore, plaintiff asks Judgment as prayed for in said Complaint.

/s/ M. MITCHELL BOURQUIN
Special Assistant to
The Attorney General
Attorney for Plaintiff [41]

Verification

United States of America
Northern District of California
City and County of San Francisco—ss.

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States and attorney for the plaintiff in the above entitled action; that he has read the foregoing Amendment to Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters which

are therein stated on his information or belief, and as to those matters that he believes it to be true;

That the reason this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign;

That the sources of affiant's information and the grounds for his belief are the official communications, records, files, and documents received from the Attorney General of the United States and from the Navy Department of the United States.

/s/ M. MITCHELL BOURQUIN

Subscribed and sworn to before me this 18th day of November, 1942.

[Seal] LOUIS V. VASQUEZ

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 4, 1943.

[Endorsed]: Filed Nov. 18, 1942. [42]

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[Title of District Court and Cause.]

MOTION TO DISMISS

The above entitled action came on regularly for trial before the above entitled Court on the 13th day of November, 1942, M. Mitchell Bourquin, Esq., appearing on behalf of the plaintiff, and Charles O. Bruce, Esq. and Francis T. Cornish, Esq., appearing on behalf of the defendant, Mary T. Marin. [43]

Upon the opening of the action the defendant, Mary T. Marin, moved the Court to dismiss the ac-

tion on the ground that the complaint affirmatively shows that the action is brought to condemn private property for a private use and not for a public use, said motion being based upon the complaint on file herein.

The Court thereupon permitted the plaintiff to amend its complaint on its face, and continued the case to Nov. 18, 1942, for further consideration and argument both as to the amendment and a renewal of the motion to dismiss. The Court, on said Nov. 18, 1942, permitted the plaintiff to amend Paragraphs I and II of its complaint, and thereupon said defendant, Mary T. Marin moved, and she now moves, the Court to dismiss the action upon the ground that the complaint as amended affirmatively shows that the property involved is being condemned for a private use and not for a public use.

Said motion was, and is, based upon the original complaint and the complaint as amended, and each of them, upon the papers, records and files in said action, upon such evidence, oral or documentary, as has been or may be presented, and upon the following authorities:

Cincinnati v. Vester, 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950.

United States v. Shrelkeld, 72 F. (2d) 464.

United States v. 243.22 acres of Land in Town of Babylon, Suffolk County, N. Y., et al., 129 F. (2d) 678.

Ex parte Milligan, 71 U. S. 2; 18 L. Ed. 281.

18 Am. Jr. 632, 633, and cases there cited.
53 A.L.R. 9 et sec.
The Constitution of the United States.

CHAS. O. BRUCE
FRANCIS T. CORNISH
Attorneys for Defendant,
Mary T. Marin.

Dated: Nov. 19, 1942.
(Affidavit of Mailing)

[Endorsed]: Filed Nov. 19, 1942. [44]

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District Court of the United States
Northern District of California
Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 24th day of January, in the year of our Lord one thousand nine hundred and forty-two.

Present: the Honorable John C. Bowen, D. J. for the Western District of Washington, designated to hold and holding this Court.

No. 22080-W. Civil

[Title of Cause.]

The motion to dismiss complaint as amended as to defendant Mary T. Marin, came on this day to be heard. After argument by Francis T. Cornish,

Esq. and Charles O. Bruce, Esq., attorneys for the defendant Mary T. Marin, and by Robert F. Reynolds, Esq., on behalf of the attorney for the plaintiff, it is Ordered that said motion to dismiss be and the same is hereby granted. Further Ordered that this case be continued to November 27, 1942, at 9:45 A. M. for the settling and entering of the order dismissing case. [45]

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District Court of the United States
Northern District of California
Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 27th day of November, in the year of our Lord one thousand nine hundred and forty-two.

Present: the Honorable John C. Bowen, D. J. for the Western District of Washington, designated to hold and holding this Court.

No. 22080-W. Civil

[Title of Cause.]

After hearing Francis T. Cornish, Esq. and Charles O. Bruce, Esq. attorneys for the defendant Mary T. Marin, and Robert F. Reynolds, Esq. on behalf of the attorney for plaintiff, it is Ordered

that a judgment of dismissal as to the defendant Mary T. Marin be signed, filed, and entered herein in form as this day submitted in open Court. [46]

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In the District Court of the United States in and for the Northern District of California Southern Division.

No. 22080 W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1.9 acres of land, more or less, in Berkeley, Alameda County, California, SECURITY INVESTMENT COMPANY, a corporation, et als. including MARY T. MARIN,

Defendants.

## JUDGMENT OF DISMISSAL

The above entitled action came on regularly for trial before the above entitled Court on the 13th day of November, 1942, M. Mitchell Bourquin, Esq., appearing on behalf of the plaintiff, and Charles O. Bruce, Esq., and Francis T. Cornish, Esq., appearing on behalf of the defendant, Mary T. Marin. [47]

Upon the opening of the action the defendant, Mary T. Marin, moved the Court to dismiss the action on the ground that the complaint affirmatively shows that the action is brought to condemn private property for a private use and not for a

public use, said motion being based upon the complaint on file herein.

The Court thereupon permitted the plaintiff to amend its complaint on its face, and continued the case to November 18, 1942, for further consideration and argument both as to the amendment and a renewal of the motion to dismiss. The Court, on said November 18, 1942, permitted the plaintiff to amend Paragraphs I and II of its complaint, whereupon said defendant, Mary T. Marin, moved the Court to dismiss the action upon the ground that the complaint as amended affirmatively shows that the property involved is being condemned for a private use and not for a public use.

The Court thereupon continued the matter until the 21st day of November, 1942, and on said date again continued the matter until the 24th day of November, 1942, for hearing upon plaintiff's amended complaint and said defendant's motion to dismiss filed herein, and said motion was, upon said last named date, argued and submitted.

The Court being fully advised as to the law and the pleadings in the matter, and it appearing to the Court both from the original complaint and from the amended complaint that this is an action in eminent domain and that the real property described in the pleadings and belonging to said defendant is sought and taken by the plaintiff for the establishment of essential equipment and facilities for the expansion of American Forge Company, Berkeley, California, for [48] use in the production

of steel forgings for naval purposes; and it further appearing to the Court that the use and purpose for which said real property is sought and taken is for a private use and not for a public use, and the plaintiff having been given permission to again amend its complaint and having failed to do so and good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed that the above entitled action be, and it is hereby, dismissed as to the defendant, Mary T. Marin, and as to the real property owned by her and more particularly described in the answer of Mary T. Marin on file herein.

Dated: November 27, 1942.

JOHN C. BOWEN
Judge of the U. S. District Court

Approved and presented by
FRANCIS T. CORNISH
CHAS. O. BRUCE
Attorneys for Defendant Mary T. Marin

Approved
M. MITCHELL BOURQUIN
Attorney for Plaintiff

[Endorsed]: Filed Nov. 27, 1942. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, Plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit from the Judgment of Dismissal made and entered in this action on the 27th day of November, 1942.

M. MITCHELL BOURQUIN
Special Assistant to
The Attorney General
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 28, 1942. [50]

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[Title of District Court and Cause.]

DESIGNATION OF MATTERS TO BE INCLUDED IN RECORD ON APPEAL

To the Clerk of the above-entitled Court:

The United States, by its undersigned attorney, hereby designates for inclusion in the transcript of record upon appeal all of the pleadings, records, proceedings and evidence with reference to the parcel referred to as Lot. No. 75.

Dated this 2nd day of December, 1942.

M. MITCHELL BOURQUIN
Special Assistant to
The Attorney General
Attorney for Plaintiff

[Endorsed]: Filed Dec. 2, 1942. [51]

In the United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA

Plaintiff,

vs.

1.9 Acres of Land, more or less, in Berkeley, Alameda County, California, SECURITY INVESTMENT COMPANY, a corporation, MARY T. MARIN, et al.

Defendants.

## CERTIFIED COPY OF ORDER STAYING PROCEEDING PENDING APPEAL

The United States of America, Plaintiff in the above entitled action, having filed a Notice of Appeal to the United States Circuit Court of Appeals for the 9th Circuit from the Judgment of Dismissal made and entered in said action on November 27, 1942, and good cause appearing therefor,

It Is Hereby Ordered that the operation of said Judgment of Dismissal and all other and further proceedings, to the extent that the same affects Defendant, Mary T. Marin, and the real property owned by her and more particularly described in the Complaint on file herein, be and the same are hereby stayed pending the decision of the said Court on said appeal, and until such decision becomes final.

Dated: November 30th, 1942.

CURTIS D. WILBUR
Judge, United States Circuit Court

[Endorsed]: Filed Nov. 30, 1942. Paul P. O'Brien, Clerk. [52]

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[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT

State of California
City and County of San Francisco—ss.

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States, and Attorney for the Plaintiff in the above entitled cause; that on November 27, 1942, a Judgment of Dismissal was made and entered in Cause #22080-W in the District Court of the United States, in and for the Northern District of California, Southern Division; that on November 28, 1942, at the request of the Attorney General, a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said Judgment of Dismissal was filed in said District Court; that under the Complaint, the Declaration of Taking and Judgment on the Declaration of Taking filed in said cause, plaintiff has been in possession of the property subject of said cause and has commenced the [53] construction and develop-

ment of the public use and project described in said complaint and the same is now nearing completion; that if development of said use and project is interrupted or terminated, the plaintiff will suffer irreparable injury; that this appeal is well taken and not filed for purposes of delay.

/s/ M. MITCHELL BOURQUIN

Subscribed and sworn to before me this 30th day of November, 1942.

[Seal] LOUIS V. VASQUEZ

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 4, 1943.

[Endorsed]: Affidavit and Order Staying Proceeding, etc., Filed Nov. 30, 1942. Paul P. O'Brien, Clerk.

A True Copy
Attest: Dec. 21, 1942.
[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Dec. 21, 1942. [54]

In the District Court of the United States in and for the Northern District of California Southern Division

No. 22080-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1.9 Acres of Land, more or less, in Berkeley, Alameda County, California, SECURITY INVESTMENT COMPANY, et al.,

Defendants.

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION IN CIRCUIT COURT OF APPEALS. (Rule 73 (g))

On Application of M. Mitchell Bourquin, Special Assistant to the Attorney General, Attorney for Plaintiff in the above entitled action, and good cause appearing therefor;

Now, Therefore It Is Ordered that the time of Plaintiff for filing record on appeal and for docketing the above entitled action on appeal for the Circuit Court of Appeals, 9th Circuit, in pursuance of Notice of Appeal heretofore filed by Plaintiff, be and the same is hereby extended to and including the 28th day of January, 1943. [55]

The within Order is made upon the provisions of

Rule 73 (g) in the Rules of Federal Court Procedure.

Dated: January 6th, 1943.

MARTIN I. WELSH
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed Jan. 6, 1943. [56]

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 56 pages, numbered from 1 to 56, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America, vs. 1.9 Acres of Land, etc., Berkeley, etc., et al. No. 22080-W, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Six Dollars and Sixty-Five Cents ($6.65) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 26th day of January A. D. 1943.

[Seal] WALTER B. MALING
Clerk
WM. J. CROSBY
Deputy Clerk. [57]

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[Endorsed]: No. 10357. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Mary T. Marin, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 28, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10357

UNITED STATES OF AMERICA,
Plaintiff,

vs.

1.9 Acres of Land, more or less, in Berkeley, Alameda County, California, SECURITY INVESTMENT COMPANY, a corporation, MARY T. MARIN, et al.,
Defendants.

## ORDER STAYING PROCEEDING PENDING APPEAL

The United States of America, Plaintiff in the above entitled action, having filed a Notice of Appeal to the United States Circuit Court of Appeals for the 9th Circuit from the Judgment of Dismissal made and entered in said action on November 27, 1942, and good cause appearing therefor,

It Is Hereby Ordered that the operation of said Judgment of Dismissal and all other and further proceedings, to the extent that the same affects Defendant, Mary T. Marin, and the real property owned by her and more particularly described in the Complaint on file herein, be and the same are hereby stayed pending the decision of the said Court on said appeal, and until such decision becomes final.

Dated: November 30, 1942.

CURTIS D. WILBUR
Judge, United States Circuit Court.

[Endorsed]: Filed Nov. 30, 1942. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

## AFFIDAVIT

State of California,
City and County of San Francisco—ss.

M. Mitchell Bourquin, being first duly sworn, deposes and says:

That he is a Special Assistant to the Attorney General of the United States, and Attorney for the Plaintiff in the above entitled cause; that on November 27, 1942, a Judgment of Dismissal was made and entered in Cause #22080-W in the District Court of the United States, in and for the Northern District of California, Southern Division; that on November 28, 1942, at the request of the Attorney General, a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said Judgment of Dismissal was filed in said District Court; that under the Complaint, the Declaration of Taking and Judgment on the Declaration of Taking filed in said cause, plaintiff has been in possession of the property subject of said cause and has commenced the construction and

development of the public use and project described in said complaint and the same is now nearing completion; that if development of said use and project is interrupted or terminated, the plaintiff will suffer irreparable injury; that this appeal is well taken and not filed for purposes of delay.

M. MITCHELL BOURQUIN

Subscribed and sworn to before me this 30th day of November, 1942.

[Seal] LOUIS V. VASQUEZ

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires December 4, 1943.

[Endorsed]: Filed Jan. 28, 1943. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS

The Appellant, United States of America, makes the following statement of points on which Appellant intends to rely upon the appeal herein:

(1) The District Court erred in dismissing the action.

(2) The District Court erred in holding that the land was not being taken for public use.

(3) The District Court erred in holding that the

Complaint and Amended Complaint did not state a public use.

UNITED STATES OF AMERICA
By M. MITCHELL BOURQUIN
Special Assistant to the Attorney General.

[Endorsed]: Filed Feb. 9, 1943. Paul P. O'Brien, Clerk.